Petition

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ALEXANDER L. STEVAS,
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NO. 81-1559

In the Supreme Court of the United States

OCTOBER TERM, 1981

ORLANDO G. VILLALTA

Petitioner

VS.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can the discretionary exclusion of unreliable evidence by a Federal trial judge be reversed by a Court of Appeals absent a finding of abuse of discretion or clear error.

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26 United States Code, Section 5681(b) 1,4

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Petitioner, Orlando G. Villalta, prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding on December 7, 1981.

On an interlocutory appeal by the government, that Court reversed the following Order by the District Court excluding testimony by an alleged co-conspirator:

"The defendant also moved the Court to hold an evidentiary hearing to determing (sic) the competency of co-defendant Beau A. Hemenway to testify. Mr. Hemenway served as Mr. Villalta's interpreter in various meetings and transactions related to this case. Based upon three separate tests conducted in open court on January 8, 1981 with the aid of interpreter Beatrice MacCormac, and taking into account Ms. MacCormac's evaluation of Mr. Hemenway's abilities as a speaker and translater of Spanish, the Court finds that Mr. Hemenway's testimony as to situations in which he depended upon his knowledge of Spanish for a comprehension of events taking place would not be sufficiently credible to bring before a jury. Accordingly, such a testimony from Mr. Hemenway will not be admitted at trial.

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix, as does the full text of the District Court's ruling.

JURISDICTION OF THE SUPREME COURT

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 7, 1981. The timely petition for rehearing *en banc* was denied, without poll, on January 6, 1982. This petition for certiorari was filed within 60 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rules of the Supreme Court of the United States, Rule 17(1)(a).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES OF EVIDENCE INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation." (Emphasis added.)

Federal Rules of Evidence, Rule 104, provides in pertinent part:

> "(a) *Preliminary questions concerning* the qualifications of a person to be a witness, the existence of a privilege, or *the admissibility of evidence shall be determined by the court,* subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges . . ." (Emphasis added.)

Federal Rules of Evidence, Rule 403, provides:

> "*Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,* or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Emphasis added.)

STATEMENT OF THE CASE

Colonel Orlando G. Villalta, former Attorney General of Nicaragua currently in exile in the United States, is presently charged with the violation of Title 18, United States Code, Section 371, relative to a conspiracy to violate Title 26, United States Code, Section 5861(b) and 5871, the Gun Control Act of 1968. This charge arose out of a series of conversations between Colonel Villalta, his then nephew by marriage Beau A. Hemenway, and undercover agents of the United States government. During these conversations, Hemenway undertook to act as Colonel Villalta's interpreter. Subsequently, Hemenway, pursuant to an agreement with the government, was given deferred prosecution in return for his testimony against Colonel Villalta.

Hemenway's native language is English and, according to the District Court's own interpreter, he speaks Spanish "in a very partial fashion." Colonel Villalta is a native of Nicaragua, and speaks only Spanish. The two governmental agents involved in this case do not speak Spanish.

There were four separate occasions when Colonel Villalta and Hemenway met with one or both of the undercover agents. At all of these meetings, Hemen-

way purported to interpret what the agents said to Colonel Villalta from English to Spanish, and what Colonel Villalta said to the agents from Spanish and English.

It should be noted that audio recordings were made of one of the meetings, and both audio and video recordings were made of another meeting.

The accuracy of Hemenway's interpretation was necessarily limited by his knowledge of Spanish. Accordingly, the trial court was requested to evaluate Hemenway's ability to understand and interpret spoken Spanish.

On January 8, 1981, a hearing was held before Judge Charles A. Schwartz, Jr. in order to make the requested evaluation. This evaluation consisted of four parts:

(1) Upon suggestion of the United States Attorney, Hemenway was asked to translate a passage from written English, read to him in Spanish by the court's interpreter;

(2) Next, Judge Schwartz wrote a set of simple sentences in English and had the interpreter read them to Henenway in Spanish, who in turn interpreted then to the court in English;

(3)Colonel Villalta then made a statement in Spanish and Hemenway translated it into English. The interpreter compared the Spanish statement with the English translation for accuracy; and

(4)Finally, a portion of the government's transcript from one of the recorded meetings containing a statement by Colonel Villalta was read in Spanish by the interpreter to Hemenway. Judge Schwartz compared his reponse in English to the government's translation.

At the conclusion of the fourth test, Judge Schwartz asked the interpreter for her opinion as to Hemenway's ability to speak Spanish. She stated:

> "I think that he would be able to manage quite fine in conversation that would be either among people of a very low level of education, in the sense that he seems to have learned Spanish with very uneducated Cubans or to have gone to school and to have learned it in a very partial fashion. That would be my evaluation. So that in a speeded-up conversation, he would only have to—— he could only translate partially and block out certain parts, or knowing what was going on could help him give the essence of what he was——of what was going on but by no means could he give the full contents of what was going on."

Judge Schwartz stated for the record that he had about the same impression of the ability of Hemenway to translate.

Three of the tests given by Judge Schwartz require no knowledge of Spanish in order to make an evaluation. Those three tests originated from English and terminated in English. Schematically, the tests could be represented as:

English ------> Spanish ------> English

Judge Schwartz compared both English versions. The discrepancy between the two could safely be attributed to Hemenway.

Based on the above circumstances, Judge Schwartz determined, in the exercise of his discretion, that Hemenway would not be allowed to testify before the jury as to situations in which he depended upon his knowledge of Spanish for a comprehension of the events taking place. The government appealed the ruling to the United States Court of Appeals for the Fifth Circuit. On December 7, 1981, the Court of Appeals, by Per Curiam opinion, reversed the trial court. The Court of Appeals held that the issue was one of credibility, and therefore a jury question. The issue of judicial discretion was not addressed by the appellate panel.

A rehearing was applied for on December 21, 1981, and denied by the panel without poll on January 6, 1982.

Subsequent to denial of the *Petition for Rehearing*, defendant moved the District Court to stay further proceedings pending petition for writ of certiorari to this Court. The District Court in effect granted the motion for the stay, conditioned on defendant's timely Petition for Writ of Certiorari.

REASONS FOR GRANTING WRIT

A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE A FEDERAL COURT OF APPEALS HAS SO FAR DEPARTED FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Specifically, a panel of the Court of Appeals for the Fifth Circuit reversed a discretionary ruling of a District Court without finding abuse of discretion or clear error. In effect, the panel substituted its judgment for his.

The Trial Court based his ruling on Federal Rules of Evidence, Rule 104(a) and Rule 403. Rule 403, particularly, gives the trial court the power to exclude evidence, however relevant, "if its probative value is substantially outweighed by the danger of un-

fair prejudice, confusion of the issues, or misleading the jury . . . ."

Exclusion of evidence as a sanction for governmental violation of a protected right is often justified by its deterrent effect, and is often perceived to thwart the even-handed administration of justice.

However, exclusion of evidence because of the danger of prejudice arising therefrom is essential to a fair trial by an impartial jury. *Lakeside v. Oregon*, 435 U.S. 333, 341-42, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978). Judge Schwartz obviously felt that to rule otherwise than he did would have created a risk of misleading or confusing the jury so great as to upset the balance of advantage gained by such evidence. See *United States vs. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed. 2d 99 (1975). Such decisions are of necessity "judgment calls," and have always been held to rest primarily within the sound of discretion of the trial court. See, J. Weinstein and M. Berger, 1 Weinstein's *Evidence*, Section 403[2] at 403-14, 15.

If "sound discretion" is to remain meaningful, it must not be abused by district courts that apply it, nor disturbed by appellant courts on review. By definition, discretion may be neither strictly bound nor unfettered. It is the exercise of judgment within limits. In practical effect, "sound discretion" is de-

fined by the standard of appellate review applied to rulings based on it:

> That such rulings will not be disturbed absent a finding of clear error or abuse of discretion.

There was no such finding by the Court of Appeals in this case. Instead, it chose to follow the government's appreciation of the issue involved:

> "Whether the ability to translate a foreign language by a witness is a question of credibility for the jury." (Brief of the United States on appeal.)

By thus framing the issue, the government adroitly side-stepped Rule 403, and the discretionary aspect of the trial court's ruling. Attention was diverted from the trial court's discretionary finding of danger of prejudice to the legal issue of credibility *vel non* of a witness—— an issue neither relevant to, nor dispositive of, the appeal.

The error in the Court of Appeals was probably inadvertent; however, the result is a gross deviation from the usual and accepted course of appellate review. The crucial function of Federal District Court judges to exclude unreliable evidence cannot survive the decision that now stands in this case, and that has now become law in the Fifth Circuit.

Notwithstanding the interlocutory nature of the appeal below, Supreme Court review is necessary to restore, or at least delimit, trial court discretion to determine admissibility of evidence.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this court, certifies that pursuant to Rule 28, Supreme Court Rules, service of this Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit has been made on counsel for Respondent by enclosing three copies thereof in an envelope addressed to:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing same in the United States mail, postage prepaid, at New Orleans, Louisiana, on February 19, 1982; and further certifies that all parties required to be served have been served.

GEORGE HENRY TROXELL, III

Appendix

Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed:(Feb. 4, 1981)
Received: (Feb. 5, 1981)

UNITED STATES OF AMERICA	CRIMINAL SECTION
VS.	No. 80-464
ORLANDO G. VILLALTA and BEAU A. MENENWAY	SECTION "A"

SCHWARTZ, J.

Defendant Orlando G. Villalta has moved to suppress all evidence gained by the government in connection with the stopping of defendant in the New Orleans airport on October 6, 1980. In support of the motion, defendant avers that he was stopped and questioned on that occasion by agents of the government, that said agents possessed warrants for his arrest and had no intention of allowing him to board his flight for El Salvador, and that said agents questioned him prior to advising him of his constitutional rights. *See Miranda v. Arizona*, 384 U.S. 435 (1966). In colloquy at the argument of the motion in open court, the assistant United States attorney advised that Mr.

Villalta's allegations as to these facts were correct. Under these circumstances, the decision of the Court of Appeals for the Fifth Circuit in *United States v. Henry,* 604 F.2d 908 (5th Cir. 1979) controls the court there held that *Miranda* warnings must be given to persons entering[1] the United States when that interrogation is custodial in nature and seeks information for the purpose of using it against the person in a criminal proceedings. *Id.* at 915.

The Fifth Circuit has adopted a four-pronged test for determining whether an individual is in a custodial situation; the criteria are "(1) probable cause to arrest; (2) subjective intent of the law enforcement officer; (3) subjective belief of the defendant; and (4) the focus of the investigation." *Id.* at 915-916; *see United States v. Warren,* 578 F.2d 1058 (5th Cir. 1978). The facts of this case reveal that the law enforcement officers had in their possession at the time they stopped defendant that which is the quintessential "probable cause" for bringing about an arrest: an arrest warrant. The subjective intent of the officers, as conceded by the government's attorney, was at all times to arrest the defendant prior to his boarding the plane. Thus, the defendant's subjective belief could hardly have been other than that he was being detain-

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1. Here, of course, the defendant was in fact leaving the country; the applicable law is the same.

ed by law enforcement officials and had no ability to walk away; indeed, his belief in this regard was entirely correct. Given the existence of the arrest warrant in the officer's pocket at the time defendant was stopped, there can be no gainsaying that the defendant was the focus of the investigation; the subsequent indictment further reveals this. In sum, the defendant was at no time the focus of a routine border search; instead, he was from the beginning the specific target of an operation which officers fully intended to culminate in his arrest. Under these circumstances, defendant was in custody for *Miranda* purposes from the moment he was accosted by agents, at which time the agents sought information to use against him in a criminal proceeding. The government now attempts to make use of that information in this criminal proceeding; this, for the reasons outlined above, they cannot be allowed to do. The defendant's motion to suppress is GRANTED.

The defendant also moved the Court to hold an evidentiary hearing to determing (sic) the competency of co-defendant Beau A. Hemenway to testify. Mr. Hemenway served as Mr. Villalta's interpreter in various meetings and transactions related to this case. Based upon three separate tests conducted in open court on January 8, 1981 with the aid of interpreter Beatrice MacCormac, and taking into account Ms. MacCormac's evaluation of Mr. Hemenway's

abilities as a speaker and translater of Spanish, the Court finds that Mr. Hemenway's testimony as to situations in which he depended upon his knowledge of Spanish for a comprehension of events taking place would not be sufficiently credible to bring before a jury. Accordingly, such testimony from Mr. Hemenway will not be admitted at trial.

New Orleans, Louisiana, this 3rd day of February 1981.

/S/ illegible

UNITED STATES DISTRICT JUDGE

Appendix B

United States District Court
Eastern District of Louisiana

UNITED STATES OF AMERICA
CRIMINAL ACTION
VS. No. 80-464
ORLANDO G. VILLALTA and SECTION "A"
BEAU HEMMENWAY

BEAU A. HEMENWAY

Transcript of proceedings on February 18, 1982 at pg. 14 and 15.

District Court's ruling on Government's Motion to Reconsider.

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* * *

THE COURT:

Now, as far as the Motion to Reconsider my Previous Motion to Suppress the Testimony of Mr. Hemenway I am not going to change my previous rul-

ing with respect to that. I gave that witness, as I recall, three different tests, and I am convinced from the three different tests that there is grave doubt as to his ability to translate properly. Although the record doesn't reflect it, if we had a video tape anyone could see the hesitancy and the time it took him to translate some of the language. And whereas it might be admissable in a civil case, it certainly, in my opinion, is not admissible in a criminal case.

Now, that doesn't mean that I won't let Mr. Hemenway testify as to one on one conversations which he had with the defendant. And the case that the government cited, as I read it, gave the Court the discretion to let it go to the jury. It didn't say it had to go to the jury, it was question of fact for the jury. But I believe that Rule of Evidence 403 sustains me in suppressing that evidence.

THE COURT: Thank you, gentlemen.

REPORTER'S CERTIFICATE

I, JULIANNE W. ANDRESSEN, hereby certify that the foregoing is a true and correct transcription of my STENOGRAPHIC notes taken in these proceedings on February 18, 1981 before the Honorable Charles Schwartz, Jr., District Judge presiding, United States District Court, 500 Camp

Street, New Orleans, Louisiana.

/S/ Julianne U. Andresen

Julianne W. Andressen, CSR, RPR
Official Court Reporter
United States District Court
New Orleans, Louisiana

Appendix C

UNITED STATES of America,
Plaintiff-Appellant,
v.
Orlando G. VILLALTA,
Defendant-Appellee.

No. 81-3096.

United States Court of Appeals,
Fifth Circuit.

Dec. 7, 1981.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before AINSWORTH, GARZA and RANDALL, Circuit Judges.

PER CURIAM:

Orlando G. Villalta and Beau A. Hemenway, Villalta's nephew, were charged in an indictment with conspiracy to acquire firearms, as defined by 26

U.S.C. §5845, without complying with the provisions relating to the transfer of such firearms set forth in 26 U.S.C. § 5812(b). As a result of pre-trial negotiations, the co-defendant Hemenway was placed on thirty-six months active probation pursuant to a pre-trial diversion plan which provided that Hemenway was to cooperate completely and truthfully in this case.

Villalta is a native of Nicaragua and is Spanish speaking. Hemenway speaks some Spanish and was involved in negotiations for the purchase of the firearms. During several conversations with undercover operatives of the Jefferson Parish Sheriff's office and the Bureau of Alcohol, Tobacco and Firearms, Hemenway acted as the interpreter between the agents and Villalta. Two of these conversations were recorded and independently translated by personnel of the Bureau of Alcohol, Tobacco and Firearms.

In view of the anticipated testimony of Hemenway, the district court held a hearing relating to the ability of Hemenway to translate Spanish into English. Three tests were given to Hemenway, and a court appointed interpreter, recognized as an expert in simultaneous interpretation, expressed the following opinion as to Hemenway's ability to translate:

> I think that he would be able to manage quite fine in conversation that

> would be either among people of a very low level of education, in the sense that he seems to have learned Spanish with very uneducated Cubans or to have gone to school and have learned it in a very partial fashion. So that in a speeded up conversation he would have only to—he could only translate partially and block out certain parts, or knowing what was going on could help him give the essence of what he was—of what was going on, but by no means give the full contents of what was going on. (R.V. 2 50).

On February 3, 1981, the district court issued its ruling to the effect that "Mr. Hemenway's testimony as to situations in which he depended upon his knowledge of Spanish for comprehension of events taking place would not be sufficiently credible to bring before a jury. Accordingly, such testimony from Mr. Hemenway will not be admitted at trial." The government filed a motion to reconsider the ruling of the trial court. On February 18, 1981, the district court denied the government's motion for reconsideration and maintained its earlier ruling. This appeal by the government followed.

[1] Rule 601 of the Federal Rules of Evidence is

the general rule relating to the competency of a witness to testify. It states in pertinent part that "every person is competent to be a witness except as otherwise provided in these rules." Rule 602 provides that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." The offer of the testimony of Hemenway as to his understanding of the conversation and events which took place is certainly within his personal knowledge of the matter at issue since he was present during the conversations. Hemenway is not being offered as an expert in interpretation and the rules of evidence pretaining to expert witnesses are not applicable here. A witness is competent to testify if he is capable of communicating relevant material and understands he has an obligation to do so.

[2] Credibility of witnesses is normally a question for the jury to determine. See *United States v. Jackson*, 576 F.2d 46 (5th Cir. 1978). *In United States v. Cipriano*, 493 F.2d 26 (5th Cir. 1974), this court stated:

> As a single point on appeal from this cocaine conviction, defendant claims prejudicial error in allowing a Spanish speaking rebuttal witness, who used an interpreter, to testify to English

> conversations between defendant and a Government agent. All parties to the conversations testified, including the defendant. The evidence reveals that the witness understood some English and testified that he could understand a little of the conversations. He does not appear to have testified to any more than he understood. We perceive no error in the ruling that the witness' language difficulties went to the weight to be accorded his testimony and did not render his testimony incompetent as a matter of law. The matter was properly submitted for jury determination.

Id. at 26.

[3] In the present situation, the credibility of the witness' testimony as to Spanish conversations with the defendant Villalta is subject to cross-examination as to his ability to understand Spanish. The opinion of the expert witness as to that ability will also be presented to the jury.

Finally, the jury will be able to consider independent evidence of Hemenway's ability to understand Spanish in the form of the two tape-recorded con-

versations between the undercover agents, Hemenway and Villalta wherein the translations can be compared to the actual conversations in Spanish between the witness and the defendant.

Accordingly, we think that the district court was in error in holding that the witness was not competent to testify and we reverse the decision of the district court to that effect.

REVERSED.

Appendix D

United States Court of Appeals
For the Fifth Circuit

No. 81-3096

D. C. Docket No. CR 80 464 "A"

UNITED STATES OF AMERICA
Plaintiff-Appellant,

versus

ORLANDO G. VILLALTA,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before AINSWORTH, GARZA and RANDALL, Circuit judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

December 7, 1981

ISSUED AS MANDATE:

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-3096

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

ORLANDO G. VILLALTA,
Defendant-Appellee

Filed: Jan. 6, 1982
Received: Jan. 6, 1982

Appeal from the United States District Court for the
Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 12/7/81, 5 Cir., 1981, ____F.2d____).
(January 6, 1982)

Before GARZA and RANDALL, Circuit Judges.*
PER CURIAM:

(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ Carolyn Dioreen Randall
United States Circuit Judge

*Due to his death on December 22, 1981, Judge Ainsworth did not participate in this decision. The petition for rehearing is being decided by a quorum. 28 U.S.C. 46(d).

APPENDIX F

MINUTE ENTRY
FEBRUARY 3, 1982
SCHWARTZ, J.

Filed: Feb. 3, 1982

UNITED STATES OF AMERICA

CRIMINAL SECTION

VS. No. 80-464

ORLANDO G. VILLALTA and BEAU HEMMENWAY SECTION "A"

The Court has taken into consideration the motion of defendant Orlando G. Villalta for a stay of these proceedings pending a writ of certiorari to the United States Supreme Court, which as mover represents, should be filed within sixty days from January 6, 1982. However, to this Court's knowledge, no such writ has been filed. Therefore, the request for a stay at this time of these proceedings is denied as premature.

In the event a writ is filed, it would appear then that the ends of justice would be served by granting the stay, as the granting of such outweighs the best interest of the public and defendant in a speedy trial and a miscarriage of justice would result if the stay

were not granted for the reasons outlined in mover's motion and memorandum.

CC:

ALL COUNSEL OF RECORD

Opposition

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No. 81-1559

In the Supreme Court of the United States

OCTOBER TERM, 1981

ORLANDO G. VILLALTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1559

ORLANDO G. VILLALTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing, on the government's appeal, the district court's pretrial ruling that a witness was not competent to testify as to certain matters.

Petitioner and his nephew, Beau A. Hemenway, were charged in an indictment returned in the United States District Court for the Eastern District of Louisiana with conspiracy to acquire firearms without complying with the provisions regulating the transfer of firearms, in violation of 26 U.S.C. 5812(b) and 5845. Following pre-trial negotiations, Hemenway was placed on probation for 36 months pursuant to a pre-trial diversion plan, on condition that he cooperate and testify truthfully in the prosecution against petitioner. Thereafter, on petitioner's motion, the district court conducted a hearing to determine Hemenway's ability

to translate Spanish into English. It ruled that Hemenway was not competent to testify "as to situations in which he depended upon his knowledge of Spanish for a comprehension of events taking place" (Pet. App. A3-A4). The court of appeals reversed (Pet. App. C1-C6).

Petitioner contends (Pet. 8-11) that the court of appeals erred in reversing the district court's order finding that Hemenway was incompetent to testify regarding conversations held in Spanish. Whatever the merits of petitioner's contention, it is not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied had the district court denied his motion to exclude testimony. If petitioner is acquitted following a trial on the merits, his contention will be moot. If, on the other hand, petitioner is convicted, he will then be able to present his present contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1982

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[1]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

DOJ-1982-03